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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 568

HOWARD B. QUINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your Petitioner, Howard B. Quinn, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered in this cause on July 24, 1968, and thereafter corrected on August 28, 1968. The Petition for Rehearing was denied on August 29, 1968.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit printed in the Appendix attached hereto, infra, pages 1a-13a, is unreported at the present.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment V to the Constitution of the United States provides as follows: (in relevant part)

> "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

Title 18, U.S.C. Section 657 provides in relevant part as follows:

> "Whoever, being an officer . . . of . . . any . . . savings and loan . . . association . . . the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . embezzles, abstracts, purloins or wilfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined . . . or imprisoned . . .".

REASONS RELIED ON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

1. There is a conflict between the decisions of the United States Court of Appeals for the Seventh and Third Circuits on the propriety of the instruction on the subject of the "assumption of truthfulness" or "presumption of truthfulness" in criminal cases, *United States* v. *Evans,* June 27, 1968, No. 16751 (Third Cir. 1968) (not yet published); *United States* v. *Johnson,* 371 F. 2d 800 (3rd Cir. 1967); and *United States* v. *Meisch,* 370 F. 2d 768 (3rd Cir. 1966), hold such an instruction to be reversible error. This cause (Appendix, page 1a et seq.); *United States* v. *Schwartz,* July 1968, No. 16465 (7th Cir. 1968); and *United States* v. *Roviaro,* 379 F. 2d 911 (7th Cir. 1967) hold the instruction not to be reversible error, and, in the opinion below, it is held proper where the Defendant testifies, in direct contradiction to *United States* v. *Evans,* June 27, 1968, No. 16751 (3rd Cir. 1968). This conflict should be resolved; until it is resolved, Defendants tried in the Seventh Circuit must face an instruction which is most prejudicial, and which is not faced by men accused of like crimes being tried in the Third Circuit. Federal law on this point is not uniform, and the instruction itself invades the presumption of innocence, which is one of the rights protected by due process of law.

2. A definition of the crime of "misapplication" as the "unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association", without any definition of what is meant by "unlawfully" does not make sense, is so

vague as to be unconstitutional, provides no ascertainable standard of guilt, and violates the holdings of this Court in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921), and *Lanzetta* v. *New Jersey*, 306 U.S. 618 (1939), and is in conflict with the law on the question of the vagueness of statutes as it stands in the Ninth Circuit. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (9th Cir. 1962). This instruction, which is commonly given in the Seventh Circuit, See *United States* v. *Hickey*, 360 F. 2d 127 (7th Cir. 1966) should be held bad, or, if it is the only definition of misapplication that can be given, the statute should be held to be unconstitutional.

3. A definition of the crime of "misapplication" which can only recite that it is an "unlawful" taking or conversion, without amplification, is not a full definition of the crime, and leaves it to the jury to decide whether or not the "taking" of the money was "unlawful". An interpretation of a statute which can only say that it forbids an "unlawful taking" leaves it to the jury to apply the law to the facts with no more standard than the jury's view of what the law should be. This creates a variable standard which would vary from one district to another and from one jury to another, and is in conflict with the holdings of this court, which require that the federal criminal laws be of universal and uniform application. *Jerome* v. *United States*, 318 U.S. 101 (1943); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921); *United States* v. *Brewer*, 139 U.S. 278 (1891). This is a statute of frequent use, and the formulation of a fair and uniform definition of the proscribed conduct should be a benefit to the development of the law. This case, as presented, raised this issue squarely, and the facts are

sufficiently close on the merits that the instruction, if held to be inadequate, was necessarily prejudicial.

4. The instructions given to this jury would allow conviction upon proof of intent to injure or upon proof of intent to defraud the association. The last direct holding of this Court on this point was in *U. S.* v. *Britton*, 107 U.S. 655 (1882), when similar statutory language applicable to national banks was held to require *both* an intent to injure and an intent to defraud. Since the *Britton* case, the Courts of Appeal have come to consider that the intent need not include an intent to defraud. This allows conviction upon proof of intent "to injure" alone, which is a much lower standard than the combination of "intent to injure and defraud". The standard of guilt has been lessened by the actions of the lower Federal Courts over a long period of years, without authority from Congress. This change in the law is brought into focus in this case because it is entirely possible that this jury may have found only the intent to injure upon the facts as presented to them, although most cases decided under Title 18, U.S.C. 657, involve both elements of the crime in abundance. We submit that this point needs definition, and that this would be an appropriate case for such definition.

5. The trial court denied a mistrial after the Assistant United States Attorney made a statement in the form of a question which put before the jury the fact that the Association which had made the prepayment of rent had failed. This fact was immaterial, wholly prejudicial, and deprived the Defendant of a fair trial. The denial of the motion for mistrial, which was affirmed by the Court of Appeals, was, we suggest, a departure from the usual course of judicial proceedings such as should call for an exercise of the supervisory powers of this Court.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the instruction given to the jury on the subject of the "assumption of truthfulness" with respect to all witnesses dilute the presumption of innocence which is guaranteed to the Defendant by the Fifth Amendment to the Constitution.

2. Does a definition of "misapplication" of the funds of savings and loan associations become unconstitutionally vague when it is presented to the jury as "the unlawfully (sic) taking or conversion by a person to his own use of the money or funds of an insured savings and loan association", without further definition of "unlawfully" or "unlawful" and without definition of "conversion".

3. Is the instruction quoted in Question 2 a correct definition of the crime "misapplication", as created by 18 U.S.C. 657.

4. Is the intent required for conviction under Title 18, U.S.C. Section 657 the intent to "injure and defraud" the association, as held in *U. S.* v. *Britton,* 107 U.S. 655 (1882), or the intent to "injure" *or* "defraud" as held by the Seventh Circuit Court of Appeals in this case and in *U. S.* v. *Hickey,* 360 F. 2d 127 at 144 (7th Cir. 1966), cert den. 385 U.S. 928 (1966).

5. Whether, in the exercise of its supervisory powers, this Court should reverse on the ground that Quinn was deprived of a fair trial by the prosecutor when he asked Quinn, as the last question in the case,

"When did Beverly Savings and Loan Association close, Mr. Quinn?"

This question was used to inform the jury that the association which had made a four year prepayment of rent in the amount of $553,166.00 had failed. This fact was not previously before the jury. The jury was instructed to disregard the question, but a mistrial was denied, and the conviction followed and was affirmed.

STATEMENT OF FACTS.

The petitioner, Howard Quinn, was the chairman of the Board of the Beverly Savings and Loan Association. He also had the equitable ownership of the building in which the association was located. In March, 1963, he advised his Board of Directors that he was contemplating taking a prepayment of rent of four years against the lease which the association had with himself as landlord. In early April, 1963, he took a check for the four year prepayment, which amounted to $553,166.66 after deduction of discount. The prepayment was not concealed, but did not have the specific authority of the Board of Directors. The Association did not thereafter pay rent, and, when the Board of Directors voted to reconsider the payment, Quinn returned $53,166.66.

Quinn was indicted for misapplication of funds of an insured savings and loan association under Title 18 U.S.C. Sec. 657, for the prepayment of rent and for another act not here in question. He was also indicted in two Counts for violating Title 18 U.S.C. 1006 in committing the same acts, and was originally convicted under all counts. That conviction was reversed as to the two counts under Title 18 U.S.C. 1006, and reversed and remanded for separate trials under the two separate charges of misapplication. *U. S.* v. *Quinn,* 365 F. 2d 256 (7th Cir. 1966). The prepayment of rent charge resulted in the conviction and affirmance, the review of which is sought in this petition. The trial on the remaining count resulted in a directed verdict of acquittal entered after a hung jury.

The Government proved that Quinn was in financial difficulties at the time, and allowed the jury to learn,

by a question of the trial counsel for the Government which the jury was told to disregard, that the Association had closed after the prepayment. A motion for mistrial was denied, and the statement of counsel, and its harmful effect, were held not to be error by the Court of Appeals.

The trial judge noted that there was little conflict in the testimony, and that the case was close on the facts. (Transcript 694 and 705).

At the conclusion of all the evidence, which included the testimony of Mr. and Mrs. Quinn, the trial court held the required conference on instructions, and advised counsel that he would give the instruction found in Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F. D. 67-68 (1961). (Instruction 3.01), with a substitution of the word "assumption" for "presumption". The instruction as given was as follows: (Transcript 801):

> "If you find the assumption of truthfulness with respect to all witnesses who are sworn to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, as you may think it deserves."

Objection was made on the ground that the "assumption" of truthfulness is, of necessity, in derogation of the presumption of innocence, and the authority of *U. S.* v. *Johnson,* 371 F. 2d 800 (3rd Cir. 1967) was cited. (Transcript 716-717). The objection was overruled, and the instruction above was given with the usual instruction to the effect that the jury could consider the "interest" of any witness in the outcome of the case. (Tran-

script 803). The only witnesses with any direct interest in the outcome of the case were the Defendant and his wife.

The jury was also instructed, as to the meaning of the word "misapplication" only as follows: (Transcript 811):

> "What does misapplication or misapply mean? As used in the statute and as used in this indictment, it means the unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association."

A request that "unlawful", as used in this context, be defined, and a tendered instruction, were overruled and refused. (Transcript 722). A tendered instruction that "there is nothing unlawful, as a matter of law, about the prepayment of rent" was also refused. (Record 58, Transcript 722). Specific objection was made to the instruction at the proper time, and instructions were offered, and refused, which attempted to define "misapply". (Record 55 and 57).

On the question of the requisite intent required for a conviction of "misapplication", the Defendant offered an instruction which described the intent as that to "injure and defraud" the association. (Defendant's tendered instruction 27, Record 57). The Government offered an instruction which defined the burden of proof as requiring only that it show the Defendant acted "with intent to injure or defraud the Association." (Transcript 811).

Defendant's counsel cited *U. S.* v. *Britton,* 107 U.S. 655 (1882) to the trial court, and argued that the requisite intent is the intent to "injure and defraud" as stated by that case, and not the intent to "injure *or* defraud." (Transcript 718). This objection was overruled.

The Defendant's counsel also argued, both at the conference and in a motion in arrest of judgment, that the misapplication statute (Title 18 U.S.C. Section 657) was, as interpreted by the trial court, unconstitutional and void for vagueness under Amendment V to the Constitution of the United States. This point was overruled each time it was raised.

The post-trial motion filed within the required time was denied, as was the motion in arrest of judgment. Each of the points raised in this petition (set forth as the questions presented for review) were raised in the trial court and before the United States Court of Appeals for the Seventh Circuit, and each was overruled in the opinion which is Appendix A to this petition.

ARGUMENT.

I.

THERE SHOULD BE NO "ASSUMPTION OF TRUTHFULNESS" INSTRUCTION GIVEN IN CRIMINAL PROSECUTIONS; THIS INSTRUCTION INVADES THE PRESERVE OF THE PRESUMPTION OF INNOCENCE, DOES NOT CORRECTLY STATE THE LAW, AND IS PREJUDICIAL TO THE DEFENDANT WHETHER OR NOT HE TESTIFIES.

Certain of the trial courts in the Seventh Circuit generally instruct the jury, in criminal cases, that there is an "assumption of truthfulness with respect to all witnesses", even though that Court of Appeals has, at least once, implied disapproval. *United States* v. *Dichiarinte*, 385 F. 2d 333 (7th Cir. 1967). The instruction was given in this cause on the Court's own motion, and the record would indicate that it was anticipated, because defense counsel was prepared to cite *United States* v. *Johnson*, 371 F. 2d 800 (3rd Cir. 1967) when the trial court indicated that it would be given. (Transcript 716, 717).

This instruction puts a burden on the Defendant to testify, when he might otherwise decline the stand, because it puts an unnecessary and unreliable halo around the heads of the Government witnesses. To that extent, the instruction may be considered defective in the light of the *Griffin* case, which insulates a Defendant against improper trial compulsion to testify. *Griffin* v. *California*, 380 U.S. 609 (1965).

When the instruction is given after the Defendant has testified, as here, it creates an "assumption" or "pre-

sumption" that all witnesses speak the truth *except* those with an interest in the outcome of the case.[1] The Defendant, as the general instructions are required to say, must have his testimony viewed in the light of his own interest in the outcome of the case, (Transcript 801). Thus the assumption is easily destroyed as to the Defendant, and, in this case, as to his wife, who was a material witness. It remains of benefit to the Government witnesses, who are not generally directly interested in the outcome of prosecutions, and were not so interested in this case.

In *United States* v. *Evans,* decided in the Third Circuit Court of Appeals on June 27, 1968, and not yet reported, the defendants testified in their own behalf, but the instructions recited that "ordinarily it is assumed that a witness will speak the truth". No objection was made to the instruction at the trial, and the Government argued that any error was waived. It was one of the factors in the reversal of the conviction. The court pointed out the confusion which the "assumption" is likely to cause in the minds of the jury, especially when considered with the other presumptions which arise in such a case.

In other cases decided in the Third Circuit, the instruction was held to be reversible error where the Defendant did not testify. *United States* v. *Johnson,* 371 F. 2d 800 (3rd Cir. 1967); *United States* v. *Meisch,* 370 F. 2d 768 (3rd Cir. 1966). The criticism of the instruction

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[1] An "assumption" and a "presumption" are the same thing when used in this context. See *Ohio Bldg. Safety Vault Co.* v. *Industrial Board of Illinois,* 277 Ill. 96, 115 N.E. 149, at 154 (1917); *State* v. *Berlovich,* 220 Iowa 1288, 1294-95, 263 N.W. 853, 856 (1935).

in the *Meisch* case goes to its reasonableness as an expression on the subject of human fallibility; quoting Wigmore on Evidence, Vol. 2, Sec. 650 (3rd Edition), the court said: (370 F. 2d at 773):

> "Hence, a witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows."

Defendants facing trial in the Seventh Circuit must now consider, in the light of the opinion below, that they will face the "assumption of truthfulness" whether they testify or not, and must make their decision to testify in the light of that instruction. If they choose to testify, they have their own testimony judged by traditional considerations of interest, but the Government witnesses have the benefit of the "assumption". If they do not testify, then the Government witnesses are blessed with an "assumption" which vitiates the "presumption" of innocence. The opposite is true in the Third Circuit, where the instruction is always error. This conflict between the circuits is most plain, and should be resolved. This case presents an excellent opportunity for its resolution because the point was properly raised, the Court of Appeals approved the instruction, and the facts were sufficiently close that there can be little question but that prejudice resulted.

II.

THE DEFINITION OF "MISAPPLY" AND "MISAPPLICATION" AS GIVEN IN THIS CASE WILL, IF CORRECT, LEAVE THE STATUTE SO VAGUE OF MEANING AS TO BE UNCONSTITUTIONAL.

The crime of misapplication was defined by the trial judge to the jury in this language:

". . . the unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association."

No other definition was offered, except that the question of intent was defined as the "intent to injure or defraud".

This definition does not, we submit, amount to a constitutional definition of a crime such as would allow a jury to apply the law to the facts; it amounts only to the court telling the jury that, if the jury should find that the prepayment of rent was unlawful, then the jury might convict; no instructions were given to the jury on the question of prepayments of rent or on the question of the legality thereof. An instruction was tendered (Record 58), which would have told the jury that there was "nothing unlawful as a matter of law about the prepayment of rent." That instruction was refused, and the jury was left to speculate on the various questions of corporate law that arise from an analysis of Defendant's open conduct in taking a prepayment of rent. See *Berra* v. *United States,* 351 U.S. 131, at 134 (1956).

If this instruction is a correct statement of the crime of "misapplication", then the statute itself is in conflict with *United States* v. *Cohen Grocery Co.,* 255 U.S. 81 (1921).

Involved in the *Cohen* case was a statute which provided in substance as follows: (255 U.S. at page 86)

"That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree or arrange with any other person . . . (e) to exact excessive prices for any necessaries . . . any person vio-

> lating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000.00 or be imprisoned for not more than two years or both."

The Defendant, a grocer, dealt in sugar and other necessaries, and apparently sold sugar at a price as high as $19.50 for a hundred pound bag, which was considered by the jury to be excessive.

This court, at 255 U.S., page 89, concluded that the statute so obviously failed to set up an ascertainable standard of guilt, and was so obviously inadequate to inform persons accused of violation of the nature and cause of the accusation, that the statute was unconstitutional. The Court went on to say:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

To the same effect, the misapplication statute, Title 18, U.S.C. Section 657, renders it unlawful to commit a "misapplication" of funds. This could be defined with some definitiveness, and alternative instructions were offered

at the trial below which attempted to do so. The trial court felt, however, that it was enough to say only that it was necessary to prove an "unlawfully taking or conversion", and it was left to the jury to decide what taking might be unlawful. "Conversion", a word of art to lawyers, was not defined. We suggest that there is no substantial difference between allowing a jury to decide what is "unlawful" and allowing a jury to decide what is "unreasonable". See also *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

There is a substantial body of Illinois corporate law to which reference could be made to decide whether or not the prepayment of rent in this case was "unlawful". The trial judge made no attempt to refer to that law, and refused the only instruction tendered on the subject. However, even if the trial courts throughout the country attempted to instruct juries as to the local law relating to the locally unlawful nature of transactions characterized as "misapplications", then they would be faced with *Jerome* v. *U. S.*, 318 U.S. 101, and *U. S.* v. *Brewer*, 139 U.S. 278 (1891). These cases hold, in substance, that federal criminal law must remain uniform, and cannot vary from state to state.

We suggest, most respectfully, that it is unjust, and a violation of the due process clause of the Fifth Amendment, to give to a jury the right to decide what conduct shall be "unlawful". Due process does not mean that the jury should define the law; we suggest that it has always been the law that juries do *not* define the law.

These objections were timely made at the trial and in the Court of Appeals. The matter is squarely presented here upon a record which involves an act which cannot

be construed as a "purloining" or "abstraction" or "embezzlement". See Title 18, U.S.C. 657. There are many transactions which are none of those things, but which may be subject to some question, and which could lead to a prosecution. If these transactions are to be judged in the light of what a lay jury says is "unlawful", then there can be no rational basis for uniformity from one case to the next as to what set of facts constitute misapplication.

We submit that the public is entitled to more notice of what is criminal than a simple statement that it is a crime to "take unlawfully" in a manner that is neither an embezzlement, an abstraction, nor a purloining, and which need not involve an intent to defraud.

III.

THE CRIME OF MISAPPLICATION SHOULD REQUIRE AN INTENT "TO INJURE AND DEFRAUD"; THE COURT OF APPEALS HELD THAT IT REQUIRED ONLY THE INTENT TO "INJURE OR DEFRAUD".

The first misapplication statute was applicable only to national banks, and it came before this court in *United States* v. *Britton,* 107 U.S. 655 (1882). Its language was similar to Title 18 U.S.C. Section 657. The question was raised as to the intent required to prove the crime. The Court defined that intent in this language, at Page 668:

> ". . . the intent to injure and defraud is an essential ingredient to every offense specified in this section, and the failure to aver the intent is a fatal defect in the counts in which it occurs."

The *Britton* case has been followed at times, and the requirement of an intent both to injure and to defraud

has been required in certain cases. *United States* v. *Hinze,* 183 Fed. 907 (S.D. N.Y. 1909); *United States* v. *Martindale,* 146 Fed. 280 (D.C. Kan. 1903); *United States* v. *Norton,* 188 Fed. 256 (E.D. Okla. 1911); *Johnson* v. *United States,* 95 F. 2d 813 (4th Cir. 1938); cf. *Ferguson* v. *United States,* 112 F. 2d 132 (5th Cir. 1940); *United States* v. *Wiggenhorn,* 312 F. 2d 289 (9th Cir. 1963).

In another series of cases, which have arisen without the benefit of precedent in this court, the requirement has been only that there be an intent to injure *or* defraud. For example, see *United States* v. *Hickey,* 360 F. 2d 127 (7th Cir. 1966).

The opinion of the Court of Appeals in this case made it plain that the *Hickey* case was the precedent to follow, (See opinion of the court below, Appendix 1 (a), Point 2), and that the *Britton* case was of less vitality than its own recent precedent.

The trial court framed this point most clearly at Transcript, page 720, where the following appears:

> "Mr. Collins: But misapplication requires an element of fraud in order to be a misapplication, I believe.
>
> The Court: I don't think so."

The lower federal courts thus have rejected a holding of this court which has never been overruled or seriously distinguished. We seek certiorari in order that this court may determine whether or not the *Britton* case still has validity in the light of the *Hickey* case and the other lower federal cases which hold that the intent required in a misapplication case allows conviction on proof of intent to injure alone, without proof of intent to defraud.

This distinctive holding is, we submit, contrary to the meaning of *Morisette* v. *United States,* 342 U.S. 246 (1952).

This point is of importance here because Quinn, with this prepayment of rent, may well have been found guilty by a jury which believed only that the prepayment of rent was injurious, and was known by Quinn to be injurious. Hic acts were done openly, and there may well have been no finding of intent to defraud. A crime sufficiently serious to be bracketed with the words "embezzles, abstracts, purloins", should not be considered to be a crime requiring no specific criminal intent to defraud. 18 U.S.C. Section 657.

In *Johnson* v. *United States,* 95 F. 2d 813 (4th Cir. 1938), the joint intent requirement was set forth as requiring that "fraud must be found and some conversion of the funds of the bank to the use or gain of the person charged or of some person other than the bank." That holding is specifically contrary to the holding of the Seventh Circuit in this case.

We suggest that there is a plain conflict on this point between the Seventh Circuit on one side and the Fourth Circuit on the other. Further, *United States* v. *Britton, supra.,* 107 U.S. 655 (1882), makes good sense today when read with *Morisette* v. *United States,* 342 U.S. 246 (1952) in mind. Certiorari should, we submit, issue both to bring the Seventh Circuit into conformity with the holding of this Court and to permit this Defendant to have a fair trial at which a jury would be obliged to face a decision on the question of his "intent to defraud".

IV.

THE CONDUCT OF THE UNITED STATES ATTORNEY, AND THE APPROVAL THEREOF BY THE COURT OF APPEALS, SHOULD BE SUBJECTED TO THE SUPERVISORY POWERS OF THIS COURT.

At the conclusion of the recross examination, after redirect examination of the Defendant, the United States Attorney prosecuting this case asked the question:

> "When did Beverly Savings and Loan Association close, Mr. Quinn?"

This question (Tr. 675), was asked after a long and difficult trial, which, to the trial court, then appeared to be close on the merits.[2]

This question was justified by the Court of Appeals on the ground that the United States Attorney perhaps "should have been more careful", but that, having faith in the jury system, the question should not be considered prejudicial in the light of the fact that the defense had tried to prove that Quinn had been head of the association during a long period of growth.

The objection to the question was, of course, sustained, as the failure of the savings and loan association was not an issue, was not material, and had no relevance to the question of guilt or innocence. However, the motion for mistrial was denied, and the opinion of the Court of Appeals tends to indicate that the failure of a financial institution is a relevant fact in the prosecution of one of its officers for a misapplication of its funds.

---

[2] (Tr. 705—trial court, at close of all evidence, indicated that he was at "sixes and sevens on this question of whether there is sufficient evidence to establish an intent to defraud.").

Most plainly, one can embezzle from a solvent institution and be honest with an insolvent institution, and this point has no relevance whatsoever in a prosecution under any phase of Title 18, U.S.C. 657.

This is the same kind of point that arises when evidence of other crimes, or of prejudicial news information, reaches the jury. See *Marshall* v. *United States,* 360 U.S. 310 (1959); *United States* v. *Reed,* 376 F. 2d 226 (7th Cir. 1967). It would be no more correct to mention the failure of a savings and loan association than it would be to mention some other accusation that had been made against Quinn. See *Himmelfarb* v. *United States,* 175 F. 2d 924 (9th Cir. 1949).

The Court below attempted to justify this conduct on the part of the assistant United States Attorney by excusing him on a theory of "entrapment". It is plain from the record that the Assistant thought it to his advantage to ask the question, and that he therefore asked it. We believe that it had a great deal to do with obtaining a conviction in a close case.

The question was plainly improper, and such was the ruling of the trial court, which made an effort to cleanse the minds of the jury of this gross impropriety. The case was close, however, and the justification for the question was slender, and such tactic as this should not become enshrined as a precedent for like conduct in the future. This is neither fair nor correct, and the supervisory powers of this court should, we submit, be exercised to correct the lower courts, and to permit to the Defendant that fair trial which he is guaranteed by the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

For the reasons which we have stated, we respectfully pray that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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APPENDIX

CORRECTED

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 16354 SEPTEMBER TERM, 1967 APRIL SESSION, 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOWARD B. QUINN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 24, 1968

Before SCHNACKENBERG, KILEY and FAIRCHILD, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Howard B. Quinn, defendant, has appealed from his conviction under count I of an indictment[1] sentencing him to three years imprisonment.

[1] A prior conviction under all four counts of the indictment was reversed as to counts II and IV, *U. S. v. Quinn*, 7 Cir., 365 F. 2d 256 (1967).

(Opinion)

The charge against Quinn was that, in violation of § 657 Title 18, U.S.C., on April 3, 1963, he unlawfully and wilfully misapplied funds of the Beverly Savings and Loan Association (Beverly), by fraudulently causing its check for $553,166.66 to be drawn and wilfully converting same to his own use, which check purportedly represented a four-year prepayment[2] of rent by Beverly to Quinn Management Company.

Under date of February 6, 1962, Beverly had leased its premises from Quinn Management Company under a twenty-year lease[3] reserving an annual rental of $150,000 plus a percentage, which resulted in a total base rate of $3,000,000. Joseph Geisen, president of Beverly, and Miss Lana, its secretary, signed the lease for Beverly although it had not been approved by its board of directors.

Beverly moved into the new quarters in June, 1962. It occupied part of a nine-story building, which also contained other enterprises of Quinn. Prior to the prepayment of April 3, 1963, rent had been paid monthly, there had been no prepayment of rent, and there had been no security deposit.

Quinn was known to all concerned as the landlord of Beverly. He was a director and chairman of the board of directors of Beverly. He and his family owned about 66% of the Beverly stock, and Charlotte, his wife, was a director of the association. Quinn shared an office in the building with president Geisen. Defendant's control of

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[2] Although the indictment originally charged that this "prepayment" was made without the knowledge, consent and approval of the board of directors, the district court struck that language as surplusage.

[3] Executed by LaSalle National Bank, as trustee, under an agreement with defendant, of which he was the sole beneficiary.

Beverly's financial operations is shown in the evidence by his recommendation to increase the authorized outstanding shares of stock so as to meet its dividend which was approved at the February 23, 1963 meeting of the directors.

In early March, 1963, Quinn was notified by the mortgage holder of his building that his mortgage payments were then delinquent. Thereafter, on three separate occasions before the March 28, 1963 board meeting, Geisen and Quinn discussed the prepayment of rent by Beverly. Geisen testified he had specifically informed Quinn in these discussions that a prepayment of rent would jeopardize Beverly's liquidity position, undermine the association's security for mortgage payments, and would amount to nothing more than a loan to him by the association, which would not be proper.

Documentary evidence shows that the financial condition of Quinn's other businesses and companies was deteriorating and that, between March 28 and April 2, 1963, he or his wife had written checks totaling $314,249 on the Quinn Management Company account in the Pullman Bank in which there was a balance of only a few thousand dollars. This figure does not include a check for $236,585 used by Quinn to purchase recently issued shares of Beverly, which, when added to the $314,249, equalled $550,834 or only $2332.56 less than the $553,166.66 claimed to have been misapplied.

At the March meeting no motion was presented regarding any prepayment of rent nor was any approval given for any such prepayment, although Geisen testified that defendant stated to the board that, in considering a prepayment of rent, a 5% discount would be given. However, director Douglass objected that 5% would not be a proper return on the association's funds.

(Opinion)

Gerald Ahern testified that he was comptroller and treasurer of Beverly and that on April 2, 1963, defendant told him "to draw a check for four years' prepayment of rent, and that this was approved by the board of directors at a recent meeting * * *." He also testified that he had two checks drawn payable to the LaSalle National Bank, as trustee, aggregating in excess of $550,000, for four years prepayment of rent. These checks he gave to the office manager for Quinn. The next morning defendant told Ahern to take the checks and change the payee from the La Salle National Bank under a trust number to Quinn Management Company. Ahern made out a check for $553,000 payable to that company at Quinn's direction. The requisition for this check was signed by defendant with the notation in Ahern's handwriting "Reason for disbursement; prepayment of rent expense, see board of directors approval on March 28, 1963."

On April 3, 1963 President Geisen learned from Ahern of the so-called prepayment of rent. The next morning he contacted Director Douglass and Mr. Culbertson, attorney for Beverly. As a result an emergency meeting of the Beverly board was called for April 5. Contrary to the prevalent feeling expressed among the members, Quinn said he thought he had authority to act as he did and told the board he had discussed it with Geisen. However, Quinn did acknowledge that Geisen had advised against it. Quinn agreed to restore the funds taken by April 23, 1963, when the bank's regular meeting was due, but on that date had restored only $53,166.66, leaving unpaid $500,000. At that meeting the lease between Beverly and the La Salle National Bank trust was finally approved.

1. Seeking reversal of the judgment of the district court, defense counsel argues that the actions of Quinn

were done openly and in "broad daylight", and, as a matter of law, the prepayment of rent did not, therefore, constitute an act committed with that intent requisite to make it a felony.

On the other hand, the government argues that the facts and circumstances surrounding the taking of the $553,166.66 were sufficient to establish that Quinn acted for himself and in utter disregard of Beverly.

As we understand the theory of defense counsel, it is embodied in this statement in his brief:

> "The very openness with which Quinn acted belies any idea that he acted with the felonious intent required for conviction under the statute, and the existence of a written contract right to receive over a period of time the money which he did receive would add the only other element required to negative criminal intent entirely."

We reject this contention. The jury would have been justified in believing from the evidence that defendant was a man exceptionally well-versed in the financial operations in which he was engaged and that the method which he used in accomplishing the misapplication of funds of Beverly was willful and knowingly wrong. That he took them under the guise of a so-called prepayment of rent does not alter the fact that he misapplied the funds.

Defense counsel cites *Morissette* v. *United States*, 342 U.S. 246 (1952). The instant case is different from *Morissette* in which plaintiff, a fruitstand operator in summer and in winter a scrapiron collector, unsuccessfully hunted deer, but made the mistake of trying to meet his expenses of the trip by salvaging some spent bomb casings of air-force dropped simulated bombs at ground targets in a government owned range located in good deer hunting country. Plaintiff, who testified at his trial,

found the bomb casings which had been thrown into piles but not stacked or piled in any particular order and some of them had been exposed to the weather for over four years and were rusting away. He believed the casings were abandoned and had no intent to steal property. Morissette loaded some on his truck and had a farmer flatten them with a tractor. He sold the material thus obtained for $84. All that he did was in full view of passersby.

Indicted for stealing property of the United States, of a value of $84, the United States government prosecuted him and he was convicted and sentenced to two months imprisonment or a fine of $200, *as a result of which this case went through all the courts.* In a thorough opinion, the Supreme Court reversed.

A comparison of the strategic manipulations of defendant in the case at bar with the naivete of Morissette makes inapplicable here the holding of the court in *Morissette.* We are convinced that no error was committed by the trial court in this respect.

2. Defendant directs our attention to the language of 18 U.S.C. § 657:

> Whoever, being an officer * * * of * * * any * * * savings and loan * * * association * * * the accounts of which are insured by the Federal Savings and Loan Insurance Corporation * * * embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, * * * shall be fined * * * or imprisoned * * *.

His counsel contends that the term "misapplication" when used to denote a crime, lacks any definite meaning and became a crime only by statutory enactment. It is admitted that its definition was attempted in *Johnson* v.

United States, 4 Cir., 95 F. 2d 813 (1938), and that the case of *United States* v. *Britton,* 107 U.S. 655, 668 (1882), requires a combination of an intent to injure with an intent to defraud. Counsel expresses the opinion that this has resulted in holdings which appear to require a combination of intentional, deceitful and fraudulent action together with a specific financial transaction which causes loss to a protected institution and that neither injury alone nor deceit alone is enough to constitute the wrong, but that there must be proof of an injury resulting from the act. However, the district court here instructed the jury that the third element of the crime of misapplication is that the defendant did the act "knowingly, willfully and with the intent to injure or defraud the Association". Thereupon defense counsel objected because he thought that the word "or" should have been "and" and tendered an instruction accordingly. See *United States* v. *Hickey,* 7 Cir., 360 F. 2d, 127 (1966), where we discussed, at 144, the correctness of instructions under §657, and at 145, speaking of the facts in that case, we said:

> "* * * The risk to the lender is obvious, and *the requisite intent to injure or defraud* may be inferred from knowledge of this fact and misrepresentation of it. The risk of injury is similarly apparent when an officer causes a loan to be made for his own benefit through misrepresentation. * * *"

3. Defense counsel at trial objected to the court's questioning of Beverly's director, Douglass. Douglass was called as a witness and testified about the April 5, 1963, emergency board meeting in the office of Mr. Culbertson, Beverly's attorney. The testimony of Mr. Douglass about this meeting which was elicited by the court during the redirect examination of Douglass was:

> "The principal thing I recall is Mr. Culbertson's statement that he would not have handled the redemption of the property on the farm, that involved,

> I think, something like $95,000.00, if he had known the funds had come from this advance payment of rent."

Counsel at trial moved for a mistrial or, in the alternative, to strike the testimony relating to what Culbertson said as being prejudicial. The court denied both motions.

In this court, defense counsel now contends that Douglass' answer was prejudicial hearsay. He urges that Culbertson did not testify and that there is no evidence that he was unavailable at the time of the trial; furthermore that Douglass was allowed to testify as to conversations which occurred at the meeting.

Defense counsel relies on *Wigmore on Evidence,* 3rd Edition (1940), §1362, Volume 5, page 10. We think it is misplaced. However, in *Wigmore on Evidence,* 3rd Edition (1940), § 1766, Volume 6, page 177-78, it is stated:

> "If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the Hearsay rule does not apply."

That this thought was involved in the court's ruling below is evidenced by what it said:

> The Court: I think he is probably at this point beyond the scope in one sense of the direct or cross, but I think he is within the scope of what happened at this meeting. We are trying to find out, as I understand it, what happened at this April 5th meeting with respect to the prepayment of the rent, and it seems to me this is relevant to the issue of what the discussions were.
>
> • • •
>
> The question is whether it is properly admissible or not. I take it that the conversation which preceded a motion, the discussion which preceded a motion adopted at a directors meeting, which you gentlemen

> had ventilated in both direct and cross, that there can hardly be anything very improper about the conversation which preceded that motion even if the question is asked by the judge. I must confess to you that I don't see how you have any grounds for a mistrial because in response to a question as to what the conversation was prior to a motion being adopted, *which you both had the witness discussing,* the witness says among other things that were said was if the attorney had known that the source of some of these funds was this advance payment of rent, he would not have handled a separate transaction in which some of the funds were used the way he did. (Emphasis supplied.)

However, were the statement conceded to be hearsay, we hold that the error is harmless in view of defense counsel's refusal to agree that the jury be instructed to disregard the testimony. Rule 52 (a) Federal Rules of Criminal Procedure.

4. The court gave the following instruction to the jury:

> If you find the assumption of truthfulness with respect to all witnesses who are sworn to be outweighed as to any witness, then you will give the testimony of that witness such credibility if any, as you may think it deserves.

Defendant's counsel alleges prejudicial error by the instruction "on the ground that an assumption that witnesses tell the truth is, of necessity, in derogation of the presumption of innocence".

It is important to note that defendant voluntarily testified as a witness in this case. When he did so he made his testimony subject to the same tests as to credibility as those applied generally to all witnesses. Therefore his interest in the outcome of the case became

a matter relevant to the weight to be given by the jury to his testimony. The criticized instruction was applicable generally to witnesses in the case, including defendant. His credibility thereupon by his own act became a matter for jury consideration. This conclusion is not at variance with the holding in *United States* v. *Johnson,* 3 Cir., 371 F. 2d 800 (1967), relied on by defense counsel, where the court said, at 804:

> "* * * It therefore was of the highest importance that the presumption of the innocence of the defendant—*who did not take the stand in his defense*—should be preserved. * * *" (Italics supplied for emphasis.)

5. Defendant charges error was committed by the district court when, in instructing the jury, it said:

> "* * * What does misapplication or misapply mean? As used in the statute and as used in this indictment, it means the unlawfully taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association."

His counsel argue in this court that the jury were thus left to decide whether or not the making of a prepayment of rent might or might not be unlawful.

However, this instruction was given to the jury following a proper instruction on the elements of the crime of misapplication.(4) *United States* v. *Hickey,* 7 Cir., 360 F. 2d 127, 144 (1966); cert. den. 385 U.S. 928 (1966). We find no error in this respect.

6. Defense counsel further contend that federal criminal law should not depend upon local state law for its

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(4) This clear and exhaustive instruction dealing with the facts in the case at bar and appearing in appellant's appendix, Vol. III, page 811, *et seq.*, correctly informed the jurors in language easily understood by laymen of the meaning of the words "misapplication" and "misapplied" as pertinent to this case.

applicability to a particular transaction. We doubt the seriousness of this contention in view of the charge in the indictment that defendant, with intent to defraud Beverly, unlawfully and willfully misapplied and caused to be misapplied monies, funds, and credits of Beverly in the amount of $553,166.66 by converting same to his own personal use by means of a check of Beverly for that amount.

Counsel for defendant has advanced no argument which convinces us that the present proceeding has deprived defendant of any rights under the fifth amendment to the constitution of the United States.

7. While defendant was testifying on redirect as to the reason that parts of the Beverly building were unfinished and unrented, the following colloquy ensued:

* * *

The Witness: The north and south wings of the building were unfinished subject to client's requirements. If a doctor came in we would have to accommodate a doctor. If another business came in and wouldn't need the plumbing, we would have to accommodate them.

We would have to accommodate them for the amount of size of their requirements, maybe 800 feet or a couple thousand feet. We would have to provide air conditioning and heating for that space and the corridors and electrical service.

Mr. Collins: In other words, the tenants said what they wanted and that is what you had to put in?

The Witness: We would accommodate the tenants.

Mr. Collins: That's all.

The Court: Mr. Nash, do you have anything further?

Mr. Nash: When did Beverly Savings and Loan Association close, Mr. Quinn?

Mr. Collins: Objection, objection. May I be heard on that.

(Opinion)

The Court: Sustained; completely outside the scope of redirect, certainly.

After discussion with his client, defendant's attorney made a motion for mistrial with prejudice.

The question which the government counsel asked on recross examination came after defendant had testified to the growth of Beverly from the time the witness became associated with it in 1958 from $1,000,000 in assets and deposits to $36,000,000 in February, 1963. This was over the objection of the government that the question was irrelevant. On redirect examination, defendant testified in answer to his attorneys' question that when he became president he directed the policies of the association until April of 1963, with the help of Geisen and the other directors in campaigning to get more savers, and that the assets at the end of March 1963 were $36,200,000. Immediately after this showing, the question objected to was asked. The court denied the motion for a mistrial and sustained an objection to the question. The jury was instructed as follows:

> Let me say first that I sustained Mr. Collins' objection to the question, which was highly improper and should not have been asked. Whether or not Beverly Savings and Loan closed is immaterial to this case. We are not talking about Beverly Savings and Loan's success or failure as an institution. We are talking about Mr. Quinn's alleged conduct with respect to this transaction, and whether or not that had any aspects of violation of the law. That is what you are going to have to decide.
>
> Beverly Savings and Loan could be as solvent as the First National Bank of Chicago, or as insolvent as some institution I can't think of, some insolvent institution. It wouldn't make any difference in this case, which is whether this transaction constituted a violation of the law and that's all.

So you ignore the question and don't worry about Beverly's status, whatever that status may be.

Thereupon the defense rested and, after an adjournment and reconvening, the government rested its case.

Counsel for defendant, actuated undoubtedly by an intent to impress the jury with the successful management policies of Beverly, sought to convince the jury that it was due to defendant's direction and efforts that the assets of Beverly grew from $1,000,000 to $36,200,000. In common parlance an effort was made to "puff up" the stature of defendant in the eyes of the jury. Of course, this effort was permissible as a trial tactic, although it involved some risk and invited the natural question of "what became of Beverly?" The question of "How come Beverly closed?" was perhaps unintentionally invited, if not attracted, by the direct testimony of defendant elicited by his own counsel. In fact, government counsel was entrapped, although he should have been more careful. However, we have faith in the common sense of jurors, who are people of at least average intelligence and who are able to appraise the value of such an incident as we are now discussing and to give it only the weight to which it is reasonably entitled. We are convinced that the action of the district court in entering the judgment from which this appeal was taken is corroborative of our view on this point. We would not be justified in reversing the judgment below because of this ruling by the district court.

For all of these reasons, the judgment of conviction of defendant, from which this appeal was taken, is affirmed.

Judgment Affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

HOWARD B. QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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FRED M. VINSON, JR.,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 568

HOWARD B. QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 398 F.2d 298.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1968, and a petition for rehearing was denied on August 29, 1968. The petition for a writ of certiorari was filed on September 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is reversible error to instruct the jury that it can be assumed from the fact that a witness swears to tell the truth that he will do so, where the charge is immediately followed by instructions concerning the factors which the jury may properly take into account in determining whether the assumption has been outweighed, and the defendant has testified and presented other witnesses in his behalf.

2. Whether the court's instruction that misapplication of funds means the "unlawful" taking or conversion of them to one's own use improperly allowed the jury to determine for itself whether the taking was unlawful, where the jury was also told that the taking or conversion must be with the intent to injure or defraud.

3. Whether the offense of misapplication of the funds of an insured savings and loan association requires proof of intent to "injure *and* defraud" the association, as distinguished from an intent to "injure *or* defraud" it.

4. Whether it was a proper exercise of discretion for the trial court to refuse to declare a mistrial because on recross-examination the prosecutor asked petitioner when the savings and loan association whose funds had allegedly been misapplied had closed.

STATUTE INVOLVED

18 U.S.C. 657 provides in pertinent part:

> Whoever, being an officer * * * of * * * any * * * savings and loan * * * association * * *

the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, * * * embezzles, abstracts, purloins or willfully misapplies any moneys * * * belonging to such institution * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on Count 1 of a four-count indictment (A. 4-5)[1] charging that he willfully misapplied $553,166 of the funds of a federally insured savings and loan association of which he was a director, in violation of 18 U.S.C. 657.[2] On May 12, 1967, he was sentenced to three years' imprisonment, the judgment specifying that, pursuant to 18 U.S.C. 4208(a)(2), he was to be eligible for parole at such time as the Board of Parole should deem appropriate (A. 114). The court of appeals affirmed (Pet. App. 1a-13a).

Petitioner was chairman of the board of directors of the Beverly Savings and Loan Association and the

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[1] "A." refers to the appendix to petitioner's brief in the court of appeals, a copy of which is on file in the office of the Clerk of this Court.

[2] A prior conviction on all four counts had been reversed in *United States* v. *Quinn*, 365 F.2d 256 (C.A. 7). It was there held that counts 2 and 4 were fatally defective for failure to charge offenses and that a severance should have been granted as to counts 1 and 3. Petitioner's separate retrial on count 3 (involving a matter not here in issue) resulted in a hung jury and the subsequent entry of a judgment of acquittal (Pet. 8).

owner of approximately two-thirds of its capital stock. In addition, he owned the building in which the association had its offices (A. 19, 560, 569-570).[3] During March 1963, the association was experiencing a liquidity crisis.[4] Notwithstanding this fact, petitioner, who had other financial troubles, discussed with Joseph Geisen, the president of the association and a member of the board, the possibility of the association's making a prepayment of rent to petitioner. Geisen advised that he did not think such a prepayment would be proper because it would jeopardize Beverly's liquidity position and would in effect be a loan to petitioner by the association (A. 148, 153-158; Pet. App. 3a). Notwithstanding Geisen's advice, on April 2, 1963, petitioner instructed the treasurer of the association to "draw a check for four years prepayment of rent." Petitioner falsely stated that the board of directors had approved the action at its meeting of March 28 (A. 97-99, 270-272). The treasurer drew a check of the association in the amount of $553,166 (the amount of the prepayment less a 6 per cent discount), payable to the Quinn Management Company (a sole proprietorship through

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[3] The evidence is summarized in more detail in the opinion of the court of appeals (Pet. App. 2a-4a).

[4] Neither the current earnings nor the permanent reserve capital was sufficient to meet the 4½% dividend payment that was due to be made to depositors on March 31 and the board of directors, at its February 21 meeting, had authorized the issuance of 300,000 additional shares at $1 per share in order to raise the necessary funds (A. 151-153, 230-233, 241-244, 267-270, 660).

which petitioner conducted some of his businesses), and gave it to petitioner (A. 99-104, 324, 326).

On April 3, 1963, President Geisen learned about the prepayment of rent and an emergency meeting of the board of directors was called (A. 161-164, 273-274). Petitioner told the other directors that he thought he had had the board's approval for what he had done, although he admitted that Geisen had advised against it. The other directors agreed that no such authorization had been given and that petitioner should restore the money to the association. Petitioner agreed to restore the funds by April 23, the date of the board's next regular meeting. In fact, only about $50,000 was returned by that date (A. 167-168, 170, 274-276).

ARGUMENT

1. The trial court did not commit reversible error in charging the jury that it could be assumed from the fact that a witness swears to tell the truth that he will do so (A. 800). The court immediately went on to explain that "[t]his is an assumption, however, which can be outweighed by the manner in which he testifies, the character of the testimony which he gives, or by contradictory testimony or evidence which we find more believable" (A. 800). The court elaborated at some length on the factors which the jury might properly take into account in evaluating a witness' testimony (his intelligence, motive, state of mind, interest in the outcome, degree of corroboration, etc.) and charged that if the jury found "the assumption of truthfulness with respect to all wit-

nesses" to be "outweighed as to any witness" it should give the testimony of that witness "such credibility, if any, as you may think it deserves" (A. 800-802). These instructions were taken, practically *verbatim*, from the recommended charge to the jury which appears in Mathes and Devitt, *Federal Jury Practice and Instructions, Civil and Criminal* (1965), § 9.01.[5] A number of courts have sustained such a charge—at least where, as here (see A. 497-541, 551-675), the defendant has testified himself and presented other witnesses in his behalf, so that the defense derives as much benefit from the charge as the prosecution. *United States* v. *Hoffa*, 349 F.2d 20, 52-53 (C.A. 6), affirmed on writ limited to other issues, 385 U.S. 293; *United States* v. *Persico*, 349 F.2d 6, 11-12 (C.A. 2) *(dictum)*; *People* v. *Garcia*, 129 Cal. App. 2d 251, 254-255 (1954); *People* v. *Fratianno*, 132 Cal. App. 2d 610, 629 (1955); *Coates* v. *State*, 192 Ga. 130, 136-137 (1941).

While the challenged charge has been criticized by some courts, particularly where the defendant did not testify, on the ground that it tends to derogate from the presumption of innocence,[6] we know of but one

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[5] An earlier version of the proposed instruction had referred to a "presumption" that a witness testifies truthfully (Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F. R. D. 39, 67-68 (1960)). The later version substitutes the word "assumption," the term used by the court in this case.

[6] See, *e.g.*, *United States* v. *Bilotti*, 380 F.2d 649, 654-656 (C.A. 2), certiorari denied, 389 U.S. 944; *Stone* v. *United States*, 379 F.2d 146 (C.A.D.C.); *United States* v. *Roviaro*, 379 F.2d 911, 915 (C.A. 7); *United States* v. *Meisch*, 370 F.2d 768, 773-774 (C.A. 3).

case, *United States* v. *Johnson*, 371 F.2d 800, 804-805 (C.A. 3), in which a ruling of reversible error was based solely on the giving of such a charge. That case is clearly distinguishable from this one because there the defendant had presented no evidence and, thus, the instruction "operated exclusively in favor of the government and amounted in effect to a presumption of the defendant's guilt" (371 F.2d at 805). In each of two other cases, *United States* v. *Evans*, 398 F.2d 159 (C.A. 3) (cited at Pet. 3 and 13), and *McMillen* v. *United States*, 386 F.2d 29, 32-36 (C.A. 1), certiorari denied, 390 U.S. 1031, the giving of such an instruction was a partial basis for a ruling of reversible error in circumstances where, as here, the defendant had testified and presented other evidence. Both of those cases are distinguishable from this case, however, in that in each the reversal was based not merely on the giving of an instruction of the type here challenged but on the giving of that instruction *coupled with* a failure to give a cautionary instruction concerning the need for scrutinizing the testimony of an accomplice with care.[7] Because of this combination of factors, new trials were ordered. Since the present case involves no issue pertaining to accomplice testimony (or any comparable interrelated question) and the jury was carefully charged with respect to the presumption of

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[7] An additional factor leading to the reversal in the *Evans* case was the erroneous admission of evidence concerning a prior conviction of a critical defense witness.

innocence, the *Evans* and *McMillen* cases are distinguishable and no conflict between circuits is presented.

2. There is no merit in petitioner's contention (Pet. 3-5, 14-18) that the trial court erred when, in instructing the jury as to the meaning of the term "misapplies", it said (A. 811):

> * * * What does misapplication or misapply mean? As used in the statute and as used in this indictment, it means the unlawfully [*sic*] taking or conversion by a person to his own use of the moneys or funds of an insured savings and loan association.

Petitioner argues that the instruction improperly left it to the jury to decide whether the conversion of funds involved in this case was unlawful (Pet. 15, 17). The jury was also told, however, that the taking or conversion, to be punishable, had to be "with the intent to injure or defraud the association" (A. 814-815, 816, 820, 821, 822). In light of this repeated reminder by the court of the necessity of a finding of an intent to injure or defraud, the use of the word "unlawfully" in the instruction was not prejudicial. Cf. *United States* v. *Hickey*, 360 F.2d 127, 144 (C.A. 7), certiorari denied, 385 U.S. 928, where an almost identical instruction was given. The court of appeals correctly noted that the trial court's "clear and exhaustive instruction dealing with the facts in the case at bar * * * correctly informed the jurors in language easily understood by laymen of the meaning of the words 'misapplication' and 'misapplied' as pertinent to this case" (Pet. App. 10a, n. 4).

3. Petitioner also contends (Pet. 5, 18-20) that the offense of misapplication of funds defined by 18 U.S.C. 657 requires proof of intent to "injure *and* defraud" the institution concerned—as distinguished from intent to injure *or* defraud. However, the decisions under that statute and under the similarly phrased 18 U.S.C. 656 [8] uniformly refer to the intent required to be proved as one to "injure or defraud". *United States* v. *Hickey*, 360 F.2d 127, 144 (C.A. 7), certiorari denied, 385 U.S. 928; *Giragosian* v. *United States*, 349 F.2d 166, 168 (C.A. 1); *Golden* v. *United States*, 318 F.2d 357, 361-362 (C.A. 1); *Logsdon* v. *United States*, 253 F.2d 12, 15 (C.A. 6); *Seals* v. *United States*, 221 F.2d 243, 245 (C.A. 8). Indeed, under the progenitor of these enactments, Section 5209 of the Revised Statutes, the requisite intent was specifically defined in the disjunctive:

> Every president, director, * * * or agent of any [national banking] association, who embezzles, abstracts, or willfully misapplies any of the moneys * * * of the association * * * with intent * * * to injure or defraud the association * * * [9]

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[8] 18 U.S.C. 656, providing for the punishment of "Whoever, being an officer * * * of * * * any Federal Reserve bank, member bank, national bank or insured bank, * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys * * * of such bank * * *," is, so far as relevant, identical with 18 U.S.C. 657 except as regards the type of institution protected.

[9] The "intent" clause of Section 5209, which does not appear in the section's current counterparts, 18 U.S.C. 656 and 657, has been read into the latter through judicial construc-

Although in *United States* v. *Britton*, 107 U.S. 655, the Court referred in several instances to the intent required to be proved under Section 5209 as one to "injure and defraud" the association whose funds were involved (107 U.S. at 665, 666, 668, 669), the apparent reason for the Court's use of the conjunctive was that the indictment there in issue had used it (107 U.S. at 657-659). On other occasions the Court used the disjunctive phrase of the statute itself, "injure or defraud" (at 662, 666), and it is apparent from the opinion as a whole that the two terms were used interchangeably. There is thus nothing in the decision which supports petitioner's present contention; the distinction to which he refers was simply not in issue.[10]

4. The trial court did not abuse its discretion in refusing to declare a mistrial because government counsel asked petitioner on recross-examination, "When did Beverly Savings and Loan Association close, Mr. Quinn?" (A. 674-675). Petitioner had testified on direct examination that the association's assets had grown under his stewardship from less than $1,000,000 in 1958 to approximately $36,000,000 in early 1963 (shortly prior to the alleged misapplication of funds), and the substance of this testimony had been repeated on redirect (A. 554-555, 567-568,

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tion in recognition of their derivation from the older enactment. Cf. *Seals* v. *United States*, 221 F.2d 243, 245 (C.A. 8); *Williamson* v. *United States*, 332 F.2d 123, 134, n. 16 (C.A. 5).

[10] This is equally true of the lower court decisions cited at Pet. 19, which petitioner says "followed" the *Britton* decision.

670-671). As the court of appeals observed, this "effort * * * to 'puff up' the stature of defendant in the eyes of the jury * * * invited the natural question of 'what became of Beverly?'" (Pet. App. 13a). The trial court sustained the defense's objection to the question (A. 675) and instructed the jury to ignore it and its implications (A. 695-696). In light of the provocation which elicited the query, this disposition of the incident lay within the court's discretion. Cf. *United States* v. *Caruso*, 358 F.2d 184, 186 (C.A. 2), certiorari denied, 385 U.S. 862; *Reistroffer* v. *United States*, 258 F.2d 379, 396 (C.A. 8), certiorari denied, 358 U.S. 927; *Bilderback* v. *United States*, 249 F.2d 271, 276-277 (C.A. 5), certiorari denied, 356 U.S. 946.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 568

HOWARD B. QUINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing on Denial of Petition for Certiorari

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May It Please The Court:

The denial of the petition for certiorari in this cause will have the practical effect of validating this instruction:

> "If you find the assumption of truthfulness with respect to all witnesses who are sworn to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, as you may think it deserves."

Our petition pointed out that the Seventh Circuit holds this instruction to be proper, and the Third Circuit and First Circuit tend to hold it to be improper. Pet. App., p. 9a. (7th Cir. 1968) *U. S.* v. *Meisch,* 370 F. 2d 768 (3rd Cir. 1966); *McMillen* v. *U. S.,* 386 F. 2d 29 (1st Cir. 1967).

Since the preparation of the petition, the Third Circuit has again considered this instruction in *U. S.* v. *Boone,* 401 F. 2d 659 (3rd Cir. 1968) (Decided 9/24/68). In describing the instruction, the Court said, at p. 661:

> "Ordinarily, an instruction on the presumption of truth is replete with danger in a criminal case because of the possible conflict between the presumption of truth and the superior presumption of innocence."

In the *Boone* case a majority of the panel affirmed the conviction, after indicating disapproval of the instruction, because it appeared that the Defendant, who did not testify, called numerous non-party witnesses to whom the "presumption" would apply under the instruction on a quantitative test, the giving of the instruction was considered harmless error. The dissent, by Circuit Judge Biggs, was critical of this holding (which did not overrule the *Meisch* case), and said (401 F. 2d at page 663):

> "To my mind no jury and no judge could make a valid judgment as to the veracity of witnesses under such conditions. The majority opinion commits the paradox of weighing one imponderable against another."

The *Boone* decision, (401 F. 2d 659) and the other Third Circuit decisions make it plain that there is little excuse for this instruction, and that only the failure of

the Defendant's attorney to make proper objection excused its being given there. Also, the majority declined to give retroactive effect to *U. S.* v. *Meisch*, 370 F. 2d 768 (3rd Cir. 1966). (See 401 F. 2d page 662). Retroactivity would have been required for reversal.

We submit that this instruction invades the province of the presumption of innocence, as guaranteed by the due process clause of the Fifth Amendment. If, at the close of the prosecution's case, the prosecution's witnesses are presumed to have told the truth, then there is likely to be nothing left of the presumption of innocence, and the Defendant will be obligated to take the stand in his own defense if only to overcome some of the "presumption of truthfulness" which will ornament the Government's case. This is an advantage which the prosecution should not have. The presumption of innocence should protect the defendant throughout the trial, as it always has.

The *Boone* case (401 F. 2d 659) also raises the likelihood of confusion which this Court should consider in passing upon this petition. The instruction was justified, in part, by the substantial number of witnesses called by the defendant in the *Boone* case. The Court indicated that the result could be quite different if the defendant's case were presented with fewer witnesses, or without witnesses. This will lead to numerous cases which will decide "how many" witnesses does it take to make the presumption of truthfulness of equal benefit to both sides, and therefore fair. This can be avoided if the Court will consider and either approve or not approve this instruction.

The conflict between the Seventh and Third Circuits on the new found "presumption" or "assumption" of truthfulness is growing as indicated by the *Boone* case (401 F. 2d 659). In the Third Circuit the Defendant makes his decision as to whether or not he should testify unembarrassed by the prospect of an instruction that will hallow the Government's case. His presumption of innocence lasts to the end of the trial. In the Seventh Circuit the presumption of innocence is not so strong; it is invaded by the "assumption of truthfulness", and cannot be relied upon to protect the Defendant after the Government rests. This makes a difference in the protection of the rights of a Defendant. Trial decisions will be made in the Seventh Circuit to put the Defendant on the stand which would be made the other way in the Third Circuit.

We would add that this instruction contradicts much of the experience of mankind, which goes no further than to say that most men probably want to tell the truth. Wigmore On Evidence, Vol. 2, Sec. 650 (3rd Ed.). It is also a judicial intrusion into the thought processes of the jury which is neither necessary nor helpful.

All of this leaves the law in a state in which it lacks uniformity. The Government will have an advantage in the Seventh Circuit which it lacks in the Third. We respectfully submit that the petition for certiorari should be granted in this cause to permit the rendering of a decision which will terminate this conflict between the Third and Seventh Circuits.

In accord with Rule 58 (2) of this Court, counsel for the petitioner does certify that this petition is presented in good faith and not for purposes of delay, and that

this petition is restricted to the ground that the decision of the Third Circuit in *U. S.* v. *Boone*, 401 F. 2d 659 (3rd Cir. Sept. 24, 1968) is an intervening circumstance of substantial effect, for the consideration of which a rehearing should be granted.

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